NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA, Appellee v. JEFFREY D. COPE, Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 1679 EDA 2012

Appeal from the Judgment of Sentence May 14, 2012
In the Court of Common Pleas of Carbon County
Criminal Division at Nos.: CP-13-CR-0000183-2010
CP-13-CR-0000185-2010
CP-13-CR-0000187-2010

BEFORE: BOWES, J., ALLEN, J., and PLATT, J.*

MEMORANDUM BY PLATT, J. Filed: January 4, 2013

Appellant, Jeffrey D. Cope, appeals from the judgment of sentence imposed following his guilty plea to charges in three separate cases, including rape of a child, involuntary deviate sexual intercourse (IDSI), and related offenses.[1] Specifically, he challenges the trial court's denial of his motion to withdraw his second guilty plea prior to sentencing. We affirm.

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* Retired Senior Judge assigned to the Superior Court.

[1] In a fourth companion case, CP-13-CR-0000186-2010, the trial court granted Appellant's motion to withdraw his guilty plea. (***See*** Trial Court Opinion, 1/10/12, at 9). Neither party appealed that decision, which, accordingly, is not before us for review.

The charges at issue alleged a course of various sexual assaults which began in July of 2007, against three young girls, then seven years old, ten years old and fifteen years old, respectively, and continued through May of 2009. (***See*** N.T. Guilty Plea, 4/04/11, at 12-13; ***see also*** Trial Court Opinion, 1/10/12, at 14). On December 10, 2009, Appellant appeared at the Nesquehoning Police Department for a polygraph examination conducted by an examiner from the Pennsylvania State Police. After receiving ***Miranda***[2] warnings, Appellant admitted to receiving oral sex from the ten-year-old, and having sexual intercourse on two occasions with the fifteen year old. (***See*** N.T. Guilty Plea, 4/04/11, at 13-14). The Commonwealth charged Appellant by information on Cases 183, 185, 186 and 187. Trial was originally set for September 13, 2010, reset for October 4, then continued until December 6, 2010.

In October, 2010 Appellant petitioned the court for appointment of new private counsel to replace his public defender, George T. Dydynsky, Esq. After a hearing on October 29, 2010, at which Appellant asked to withdraw the petition, the court dismissed it. Nevertheless, on December 1, 2010, Gregory Lee Mousseau, Esq., the Chief Public Defender of Carbon County, entered his appearance, replacing Attorney Dydynsky. Attorney Mousseau requested a continuance of the trial scheduled for December 6,

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[2] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

2010, which the court granted, now listing the cases for trial on January 4, 2011.

On the trial date, January 4, 2011, Appellant entered into a counseled stipulation with the Commonwealth to plead guilty to certain counts of indecent assault, and *nolle pros* the remaining charges in exchange for concurrent sentences resulting in an aggregate recommended sentence of 120 to 240 months' incarceration; Appellant also waived his right to withdraw the guilty plea. (***See*** Stipulation, 1/04/11, filed 1/06/11; ***see also*** Trial Court Rule 1925(a) Opinion, 6/21/12, at 1). On January 6, 2011, the trial court signed the stipulation and scheduled a guilty plea hearing for February 22, 2011.

On February 4, 2011, Appellant petitioned the trial court to withdraw the guilty pleas, claiming "that his attorney had convinced him to enter [them]." (Trial Ct. Rule 1925(a) Op., 6/21/12, at 2). The trial court granted the request and listed the cases for trial on April 11, 2011.

Four days before trial, on April 7, 2011, Appellant entered into a second stipulation to plead guilty to the same offenses, and again agreed to waive the right to withdraw the guilty pleas. The trial court, at a hearing on the same date, accepted the guilty pleas and ordered a pre-sentencing investigation and a Megan's law assessment.[3]

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[3] On May 10, 2012, the trial court designated Appellant to be a sexually violent predator (SVP). (***See*** N.T. Sentencing, 5/14/12, at 4). Among other
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On July 5, 2011, Appellant wrote the court, again requesting to withdraw his guilty plea. He asserted, *inter alia*, that Attorney Mousseau had "coerced" him into pleading guilty. (***Id.*** at 2; ***see also*** Appellant's letter to Trial Court, filed 7/07/11). Appellant also asserted the ineffectiveness of plea counsel, and claimed he had let counsel "talk [him] into" the plea. (Letter, 7/05/11).

The court appointed current counsel, and held a hearing on October 14, 2011. At the hearing, Appellant testified that he entered the guilty plea to receive the lesser sentence of ten to twenty years' imprisonment, rather than the sixty years his attorney advised him he could have received. (***See*** N.T. Petition to Withdraw G[uilty] P[lea], 10/14/11, at 5). When asked if he felt threatened, he replied that that he "felt threatened by a harsher sentence." (***Id.*** at 6). Appellant also claimed that he confessed after the polygraph examination so the police would let him leave the station. (***See id.*** at 7-8). At this hearing, when asked by his counsel, Appellant claimed he did not do what he was accused of doing. (***See id.***, at 6-7).

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factors, the report of the Sexual Offenders Assessment Board (SOAB) expert noted Appellant's threatening all three children with a knife to keep them silent, his extensive juvenile and adult criminal record, including over eighty misconduct citations for aggressive and threatening behavior while incarcerated, and a diagnosis of Anti-Social Personality Disorder. (***See*** N.T. Sentencing 5/14/12, Commonwealth's Exhibit #1, SOAB Report, 6/15/11, 8-13). Notably, Appellant does not challenge the SVP determination in this appeal. (***See*** Appellant's Brief, at 10).

In a memorandum and order dated January 10, 2012, the court denied the request to withdraw the guilty pleas, and on May 14, 2012, imposed an aggregate sentence of not less than 120 months' nor more than 240 months' incarceration, with credit for time served.[4] (***See*** N.T. Sentencing, 5/14/12, at 9). Appellant filed a timely notice of appeal on May 29, 2012.[5]

The sole issue Appellant raises on appeal is whether the trial court erred in not allowing him to withdraw his guilty plea prior to sentencing. (***See*** Appellant's Brief, at 3). Appellant argues that he had a fair and just reason for withdrawing his plea, that his plea had been unlawfully induced by plea counsel, and the Commonwealth did not show it would be prejudiced by the withdrawal. (***See id.*** at 6). Appellant asserts that he should be permitted to withdraw his guilty plea and proceed to trial. (***See id.*** at 10). We disagree.

> A decision regarding whether to accept a defendant's pre-sentence motion to withdraw a guilty plea is left to the discretion of the sentencing court. Pennsylvania Rule of Criminal Procedure 591 provides:

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[4] In a separate but related case, the court also sentenced Appellant to a consecutive term of not less than six nor more than twelve months' incarceration at a state correctional institution, for harassing witnesses. Appellant admitted to this offense and the sentence is not at issue in this appeal. (***See*** N.T. Sentencing, 5/14/12, at 17).

[5] Appellant also filed a timely Rule 1925(b) statement of errors on June 6, 2012. ***See*** Pennsylvania Rule of Appellate Procedure 1925. The trial court filed a Rule 1925(a) opinion, referencing its opinion of January 10, 2012.

> At any time before the imposition of sentence, the court may, **in its discretion**, permit, upon motion of the defendant, or direct, *sua sponte*, the withdrawal of a plea of guilty or *nolo contendere* and the substitution of a plea of not guilty.

Pa.R.Crim.P. 591(A).

> There is no absolute right to withdraw a guilty plea. ***Commonwealth v. Flick***, 802 A.2d 620, 623 (Pa. Super. 2002), *citing* ***Commonwealth v. Forbes***, 450 Pa. 185, 299 A.2d 268, 271 (1973). Nevertheless, "prior to the imposition of sentence, a defendant should be permitted to withdraw his plea for 'any fair and just reason,' " provided there is no substantial prejudice to the Commonwealth. ***Commonwealth v. Kirsch***, 930 A.2d 1282, 1284–1285 (Pa. Super. 2007), *quoting* ***Forbes***, 299 A.2d at 271 (Pa. 1973).
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> We will not disturb the decision of the sentencing court absent an abuse of discretion. An abuse of discretion is not merely an error judgment. ***Commonwealth v. Prysock***, 972 A.2d 539, 541 (Pa. Super. 2009). Discretion is abused when "the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable, or the result of partiality, prejudice, bias, or ill-will, as shown by the evidence or the record...." ***Prysock***, 972 A.2d at 541, *quoting* ***Commonwealth v. Chambers***, 546 Pa. 370, 685 A.2d 96, 104 (1996).

Commonwealth v. Broaden, 980 A.2d 124, 128 (Pa. Super. 2009), *appeal denied*, 992 A.2d 885 (Pa. 2010) (emphasis in original). Furthermore,

> While in ***Forbes***, our Supreme Court held that a mere assertion of innocence constitutes a "fair and just" reason to withdraw a guilty plea, in ***Commonwealth v. Iseley***, 419 Pa. Super. 364, 615 A.2d 408 (1992), this Court rejected applying ***Forbes*** in a case where the plea sought to be withdrawn was a **second or subsequent one**. ***Id.*** at 413 (emphasis added). In reaching this conclusion in ***Iseley***, we highlighted the fact that the defendant had two opportunities to assert his innocence but, instead, chose to plead guilty after thorough colloquies. ***Id.*** at 414. We characterized the defendant's delay in asserting his innocence as appearing to be "little other than a self-serving

attempt to improperly manipulate the system." ***Id.*** Lastly, we noted that

> the further delay inherent in allowing any second or subsequent guilty plea to be withdrawn on such dubious grounds is a burden too great for our already overcrowded criminal dockets to bear. Even more importantly, given that the accuracy of any subsequent trial (should the prosecution ever reach that stage) is dependent upon the ever fading memories and increasingly uncertain availabilities of the necessary witnesses, the power to prolong the prosecution could serve as a Sword of Damocles for the guilty defendant to suspend over the very heart of the trial, the search for truth. This power, we refuse to confer.

Id. (footnotes omitted).

Commonwealth v. Walker, 26 A.3d 525, 530 (Pa. Super. 2011),*appeal denied*, 40 A.3d 121 (Pa. 2012) (emphasis in original).

Here, there is no dispute, and the record confirms, that Appellant twice agreed to plead guilty to reduced charges and twice sought to withdraw that agreement (despite waiving the right to do so in exchange for the plea bargain). Accordingly, we conclude that under our controlling authority, the trial court properly declined to permit Appellant to withdraw his guilty plea a second time. ***See Walker***, ***supra***; ***Iseley***, ***supra***.

Additionally, we conclude that the trial court properly determined that it could decline Appellant's request to withdraw his second guilty plea based on substantial prejudice to the Commonwealth. ***See Broaden***, ***supra*** (quoting, *inter alia*, ***Forbes***). The trial court acted within its discretion in finding that, with a time interval of four years from the first incidents to a

future rescheduled trial date, the Commonwealth would be substantially prejudiced by the risk of memory lapses of the young victims. ***See Commonwealth v. Randolph***, 718 A.2d 1242, 1244 (Pa. 1998) ("If the trial court finds "any fair and just reason", withdrawal of the plea before sentence should be freely permitted, **unless the prosecution had been "substantially prejudiced."**) (quoting ***Forbes***, ***supra*** at 271) (emphasis added). ***See also Commonwealth v. Carr***, 543 A.2d 1232, 1234 (Pa. Super. 1988), *appeal denied*, 554 A.2d 506 (Pa. 1988) (finding substantial prejudice based on dulled memory of five year old child victim's recall of events after eight month delay).

Appellant deprecates the trial court's finding of substantial prejudice as "pure speculation", arguing that the memories of all witnesses fade over time. (Appellant's Brief, at 9). Appellant misconstrues our standard of review, which is to determine if the trial court abused its discretion. ***See Broaden***, ***supra***. It did not. The trial court's conclusion is consistent with controlling authority. ***See Carr***, ***supra***. We discern no other basis to conclude abuse of discretion, and we decline Appellant's invitation to re-weigh the findings of the trial court. Furthermore, as we have already noted, this Court looks with disfavor on efforts to delay the search for truth at trial, or thwart it altogether, by a repetitive process of pleas and withdrawals:

> Even more importantly, given that the accuracy of any subsequent trial (should the prosecution ever reach that stage)

> is dependent upon the ever fading memories and increasingly uncertain availabilities of the necessary witnesses, the power to prolong the prosecution could serve as a Sword of Damocles for the guilty defendant to suspend over the very heart of the trial, the search for truth. This power, we refuse to confer.

Walker, ***supra*** at 530.

Moreover, Appellant fails to develop an argument beyond his mere bald assertion of trial court "speculation" of fading memories, and similarly fails to cite any authority, let alone pertinent authority, to support it. Further, as noted by the Commonwealth, at the hearing on the petition to withdraw, Appellant could not recall events that had occurred four or five months earlier. (***See*** N.T. Hearing Petition to Withdraw G[uilty] P[lea], 10/14/11, at 21, 23). Appellant's claim that the Commonwealth did not show it would be prejudiced does not merit relief.

Accordingly, we decline to address further Appellant's claim that he presented a fair and just reason to withdraw the plea, because, even if we assumed for the sake of argument that he did, the trial court's finding of substantial prejudice, supported by the record and controlling authority, would justify the trial court's refusal to grant withdrawal anyway.

Finally, we reject Appellant's argument that his plea was unlawfully induced, or coerced, by plea counsel. (***See*** Appellant's Brief, at 6, 8). We agree with the trial court's conclusion that Appellant failed to prove coercion or any other form of illegal inducement. (***See*** Trial Ct. Op., 1/10/12, at 19).

Moreover, Appellant fails to develop an argument supported by reference to pertinent authority in support of his mere bald assertion. (***See*** Appellant's Brief, at 8); ***see also*** Pa.R.A.P. 2119(a), (b).

Rather, he merely cites his own prior assertion that plea counsel "talked him into it." (Appellant's Brief, at 8). Similarly, noting that counsel did not file a motion to suppress his statement to the police, he cites his own prior testimony that he "lost faith that [plea counsel] would represent him effectively." (***Id.***).[6]

Neither assertion supports the claim of coercion. Furthermore, the record is devoid of any suggestion that plea counsel misled Appellant or otherwise gave him inaccurate information about the range of sentences he was facing. ***Cf. Commonwealth v. Pardo***, 35 A.3d 1222, 1230 (Pa. Super. 2011), *appeal denied*, 50 A.3d 125 (Pa. 2012) (allowing withdrawal of guilty plea where defendant asserted innocence and alleged erroneous advice from counsel on eligibility for RRRI). Rather, plea counsel here offered Appellant his candid professional assessment of how much jail time Appellant could be facing for sexual assaults against three young girls over a period of years,

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[6] In ***Commonwealth v. Grant***, 813 A.2d 726 (2002), our Supreme Court held that claims of ineffective assistance of counsel should ordinarily be reserved for collateral review. ***See Commonwealth v. Barnett***, 25 A.3d 371, 373 (Pa. Super. 2011). Furthermore, absent an explicit waiver, not present here, this Court will no longer consider ineffective assistance of counsel claims on direct appeal. ***See id.***, at 377. Therefore, to the extent that Appellant has attempted to present an argument of ineffectiveness, his claim must await collateral review.

particularly if he was sentenced consecutively. This is diligent representation, not coercion. As this court explained in ***Commonwealth v. Patterson***, 690 A.2d 250 (Pa. Super. 1997):

> It is axiomatic that in order to bargain effectively, one must first be aware of the context of one's environment. To borrow a phrase, once the cards are on the table, the bartering may begin. We therefore hold that this statement [prosecutor's truthful statement that appellant was at risk of a minimum of twenty years' imprisonment], made to appellant's counsel during plea negotiations, was proper and permissible.

Id., at 253. Here, plea counsel's private assessment to his own client is no less proper.

Judgment of sentence affirmed.